In re: LAMERS DAIRY, INC.
AMA Docket No. M 30-2.
Decision and Order.
Filed August 16, 2001.

Milk – Marketwide pooling – Producer-settlement fund – Unfair trade practices – Premium payments – Price differential – Rulemaking procedures – Equal protection – Fourteenth amendment – Fifth amendment – Statutory construction – Due process – Presumption of regularity.

The Judicial Officer affirmed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ) dismissing the Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer rejected Petitioner's contentions that: (1) marketwide pooling required by Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) constitutes an unfair trade practice in violation of 7 U.S.C. § 608c(7)(A); (2) the failure to exempt Petitioner from the requirements of Milk Marketing Order No. 30 violates Petitioner's constitutional right to equal protection of the laws; and (3) the Class I price differential must be reduced. The Judicial Officer stated that public officials are presumed to have properly discharged their official duties and rejected Petitioner's unsupported contention that the Chief ALJ failed to consider Petitioner's evidence and Petitioner's unsupported contention that the Secretary of Agriculture was incapable of making impartial decisions regarding marketing orders and unfair trade practices. The Judicial Officer further stated that the premium paid by Petitioner to induce producers to sell milk to Petitioner is not regulated by the Agricultural Marketing Agreement Act or Milk Marketing Order No. 30. The Judicial Officer also rejected Petitioner's contention that Milk Marketing Order No. 30 was required to be promulgated in accordance with the procedures in 7 U.S.C. § 608c(17). The Judicial Officer pointed out that Congress waived the hearing requirement in 7 U.S.C. § 608c(17) in 7 U.S.C. § 7253(b)(1) which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.

Sharlene A. Deskins, for Respondent.
Richard J. Lamers, for Petitioner.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lamers Dairy, Inc. [hereinafter Petitioner], instituted this proceeding by filing a "New Petition for Exemption from Certain Regulations and/or Modification of Certain Provisions of Federal Milk Order 30 (7 CFR Part 1030) Both Chicago and Midwest" [hereinafter the Petition] on March 14, 2000. Petitioner filed the Petition pursuant to the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal milk marketing order entitled "Milk In The Upper Midwest Marketing Area" (7 C.F.R. pt. 1030) [hereinafter Milk Marketing Order No. 30]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

Petitioner alleges that Milk Marketing Order No. 30 is not in accordance with law. Petitioner seeks: (1) an exemption from the marketwide pooling of

milk required by Milk Marketing Order No. 30; (2) an exemption from the obligation to make payments to the producer-settlement fund established and maintained pursuant to Milk Marketing Order No. 30; and (3) the reduction of the Class I differential to $.30 per hundredweight of milk (Pet. at 5-6).

On May 2, 2000, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Answer of Defendant" [hereinafter Answer]. Respondent denies the material allegations of the Petition and requests the denial of the relief prayed for in the Petition and the dismissal of the Petition (Answer).

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Appleton, Wisconsin, on November 1, 2000. Richard J. Lamers, chairman of the board of Lamers Dairy, Inc., represented Petitioner. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 12, 2001, Petitioner filed "Brief in Support of Petition and Hearing Record" [hereinafter Petitioner's Post-Hearing Brief]. On January 18, 2001, Respondent filed "Respondent's Findings of Fact Conclusions of Law and Brief in Support Thereof." On February 14, 2001, Petitioner filed "Petitioners Brief in Response to Respondents Findings" [hereinafter Petitioner's Post-Hearing Response]. On February 14, 2001, Respondent filed "Respondent's Response to the Petitioner's Brief in Support of Petition and Hearing Record."

On May 2, 2001, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that Petitioner is a handler located in Appleton, Wisconsin; (2) found that Petitioner is a handler subject to Milk Marketing Order No. 30 and handles Class I milk; (3) found that Petitioner is required by Milk Marketing Order No. 30 to pool its milk under marketwide pooling; (4) found that the rulemaking record on which the Secretary of Agriculture promulgated Milk Marketing Order No. 30 supports the Secretary of Agriculture's conclusion that marketwide pooling is appropriate; (5) concluded that the Secretary of Agriculture's determination that marketwide pooling is appropriate under Milk Marketing Order No. 30 is in accordance with law; and (6) ordered the Petition dismissed (Initial Decision and Order at 8-9).

On June 6, 2001, Petitioner appealed to the Judicial Officer. On July 6, 2001, Respondent filed a response to Petitioner's appeal. On July 25, 2001, Petitioner filed a response to Respondent's July 6, 2001, filing.[1] On July 27,

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[1]Petitioner entitles its appeal to the Judicial Officer "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001". At the time Petitioner filed "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001," I had not issued a Decision and Order in this proceeding. Therefore, "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001," could not be an

2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section 900.66(a) of the Rules of Practice (7 C.F.R. § 900.66(a)), I adopt, with only minor modifications, the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusions of Law, as restated.

Petitioner's exhibits are designated by "PX." Transcript references are designated by "Tr."2

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of

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appeal of the Judicial Officer's Decision and Order. Based on my review of the record, I infer that "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001" is Petitioner's appeal of the Chief ALJ's May 2, 2001, Initial Decision and Order, which Petitioner filed pursuant to section 900.65 of the Rules of Practice (7 C.F.R. § 900.65). Accordingly, hereinafter, I refer to "Petitioners Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001" as Petitioner's Appeal Petition. For the same reason, I hereinafter refer to Respondent's July 6, 2001, filing entitled "Respondent's Opposition to 'Petitioner's Appeal of the Judicial Officer's Decision and Order Dated May 3, 2001 Received May 7th, 2001'" as Respondent's Response to Petitioner's Appeal Petition. I also hereinafter refer to Petitioner's July 25, 2001, filing entitled "Petitioner's Response to 'Respondent's Opposition to Petitioner's Appeal of the Judicial Officers' Decision and Order Dated May 3, 2001 Received May 7th, 2001'" as Petitioner's Response to Respondent's Response to Petitioner's Appeal Petition.

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V, XIV § 1.

5 U.S.C.:

TITLE 5–GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I–THE AGENCIES GENERALLY

CHAPTER 1–ORGANIZATION

§ 101. Executive departments

The Executive departments are:

. . . .
The Department of Agriculture.
. . . .

CHAPTER 5–ADMINISTRATIVE PROCEDURE

. . . .

SUBCHAPTER II–ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter–
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia; or
except as to the requirements of section 552 of this title–

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]

5 U.S.C. §§ 101, 551(1).

7 U.S.C.:

TITLE 7—AGRICULTURE

CHAPTER 26—AGRICULTURAL ADJUSTMENT

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress–

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to

establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608(c)(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608(c)(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating the handling of commodity

. . . .

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

. . . .

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their

marketings of milk during a representative period of time, which need not be limited to one year, (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order, and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk.

. . . .

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

. . . .

(9) Orders with or without marketing agreement

Any order pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof . . . covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary determines:

. . . .

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

> (i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have

been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing area specified in such marketing agreement or order.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and

covering the same subject matter, instituted pursuant to this subsection (15).

. . . .

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof: *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

CHAPTER 100—AGRICULTURAL MARKET TRANSITION

. . . .

SUBCHAPTER IV—OTHER COMMODITIES

PART A–DAIRY

. . . .

§ 7253. Consolidation and reform of Federal milk marketing orders

(a) Amendment of orders

(1) Required consolidation

The Secretary shall amend Federal milk marketing orders issued under section 608c of this title to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

. . . .

(b) Expedited process

(1) Use of informal rulemaking

To implement the consolidation of Federal milk marketing orders and related reforms under subsection (a) of this section, the Secretary shall use the notice and comment procedures provided in section 553 of title 5.

. . . .

USE OF OPTION 1A AS PRICE STRUCTURE FOR CLASS I MILK UNDER CONSOLIDATED FEDERAL MILK MARKETING ORDERS

. . . .

(a) FINAL RULE DEFINED.–In this section, the term "final rule" means the final rule for the consolidation and reform of Federal milk marketing orders that was published in the Federal Register on September 1, 1999 (64 Fed. Reg. 47897-48021)), to comply with section 143 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7253).

(b) IMPLEMENTATION OF FINAL RULE FOR MILK ORDER REFORM.–Subject to subsection (c), the final rule shall take effect, and be implemented by the Secretary of Agriculture, on the first day of the first month beginning at least 30 days after the date of the enactment of this Act [Nov. 29, 1999].

(c) USE OF OPTION 1A FOR PRICING CLASS I MILK.–In lieu of the Class I price differentials specified in the final rule, the Secretary of Agriculture shall price fluid or Class I milk under the Federal milk marketing orders using the Class I price differentials identified as Option 1A "Location-Specific Differentials Analysis" in the proposed rule published in the Federal Register on January 30, 1998 (63 Fed. Reg. 4802, 4809), except that the Secretary shall include the corrections and modifications to such Class I differentials made by the Secretary through

April 2, 1999.

(d) EFFECT OF PRIOR ANNOUNCEMENT OF MINIMUM PRICES.–If the Secretary of Agriculture announces minimum prices for milk under Federal milk marketing orders pursuant to section 1000.50 of title 7, Code of Federal Regulations, before the effective date specified in subsection (b), the minimum prices so announced before that date shall be the only applicable minimum prices under Federal milk marketing orders for the month or months for which the prices have been announced.

(e) IMPLEMENTATION OF REQUIREMENT.–The implementation of the final rule, as modified by subsection (c), shall not be subject to any of the following:

(1) The notice and hearing requirements of section 8c(3) of the Agricultural Adjustment Act (7 U.S.C. 608c(3)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, or the notice and comment provisions of section 553 of title 5, United States Code.

(2) A referendum conducted by the Secretary of Agriculture pursuant to subsections (17) or (19) of section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937.

(3) The Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 Fed. Reg. 13804), relating to notices of proposed rulemaking and public participation in rulemaking.

(4) Chapter 35 of title 44, United States Code (commonly known as the Paperwork Reduction Act).

(5) Any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this Act [Nov. 29, 1999].

7 U.S.C. §§ 601, 602, 608c(5)(A)-(B), (7)(A), (9)(B), (15), (17); 7 U.S.C. § 7253(a)(1), (b)(1), note (Supp. V 1999).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

. . . .

PART 1000— GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

Subpart A–Scope and Purpose

1000.1 Scope and purpose of this part 1000.

This part sets forth certain terms, definitions, and provisions which shall be common to and apply to Federal milk marketing order in 7 CFR, chapter X, except as specifically defined otherwise, or modified, or otherwise provided, in an individual order in 7 CFR, chapter X.

Subpart B–Definitions

. . . .

§ 1000.9 Handler.

Handler means:

(a) Any person who operates a pool plant or a nonpool plant.

(b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products or fluid cream products from or to any pool or nonpool plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant. Persons who qualify as handlers only under this paragraph under any Federal milk order are not subject to the payment provisions of §§ ____.70, ____.71, ____.72, ____.73, ____.76, and ____.85 of that order.

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to § ____.13 of the order. The operator of a pool plant receiving milk from a cooperative association may be the handler for such milk if both parties notify the market administrator of this agreement prior to the time that the milk is delivered to the pool plant and the plant operator purchases the milk on the basis of

farm bulk tank weights and samples.

Subpart F–Classification of Milk

§ 1000.40 Classes of utilization.

Except as provided in § 1000.42, all skim milk and butterfat required to be reported pursuant to § ____.30 of each Federal milk order shall be classified as follows:

(a) *Class I milk* shall be all skim milk and butterfat:

(1) Disposed of in the form of fluid milk products, except as otherwise provided in this section;

(2) In packaged fluid milk products in inventory at the end of the month; and

(3) In shrinkage assigned pursuant to § 1000.43(b).

(b) *Class II milk* shall be all skim milk and butterfat:

(1) In fluid milk products in containers larger than 1 gallon and fluid cream products disposed of or diverted to a commercial food processing establishment if the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification. Otherwise, such uses shall be Class I;

(2) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, ricotta cheese, pot cheese, Creole cheese, and any similar soft, high-moisture cheese resembling cottage cheese in form or use;

(ii) Milkshake and ice milk mixes (or bases), frozen desserts, and frozen dessert mixes distributed in half-gallon containers or larger and intended to be used in soft or semi-solid form;

(iii) Aerated cream, frozen cream, sour cream, sour half-and-half, sour cream mixtures containing nonmilk items, yogurt, and any other semi-solid product resembling a Class II product;

(iv) Custards, puddings, pancake mixes, coatings, batter, and similar products;

(v) Buttermilk biscuit mixes and other buttermilk for baking that contain food starch in excess of 2% of the total solids, provided that the product is labeled to indicate the food starch content;

(vi) Formulas especially prepared for infant feeding or dietary use (meal replacement) that are packaged in hermetically-sealed containers;

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public, and intermediate products, including sweetened condensed milk, to be used in processing such prepared food products;

(viii) A fluid cream product or any product containing artificial fat or fat substitutes that resembles a fluid cream product, except as otherwise provided in paragraph (c) of this section; and

(ix) Any product not otherwise specified in this section; and

(3) In shrinkage assigned pursuant to § 1000.43(b).

(c) *Class III milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cream cheese and other spreadable cheeses, and hard cheese of types that may be shredded, grated, or crumbled;

(ii) Plastic cream, anhydrous milkfat, and butteroil; and

(iii) Evaporated or sweetened condensed milk in a consumer-type package; and

(2) In shrinkage assigned pursuant to § 1000.43(b).

(d) *Class IV milk* shall be all skim milk and butterfat:

(1) Used to produce:

(i) Butter; and

(ii) Any milk product in dried form;

(2) In inventory at the end of the month of fluid milk products and fluid cream products in bulk form;

(3) In the skim milk equivalent of nonfat milk solids used to modify a fluid milk product that has not been accounted for in Class I; and

(4) In shrinkage assigned pursuant to § 1000.43(b).

(e) *Other uses.* Other uses include skim milk and butterfat used in any product described in this section that is dumped, used for animal feed, destroyed, or lost by a handler in a vehicular accident, flood, fire, or similar occurrence beyond the handler's control. Such uses of skim milk and butterfat shall be assigned to the lowest priced class for the month to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator.

Subpart H–Payments for Milk

§ 1000.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the producer-settlement fund into which the market administrator shall deposit all payments made by handlers pursuant to §§ ____.71, ____.76, and ____.77 of each Federal milk order and out of which the market administrator shall make all payments pursuant to §§ ____.72. and ____.77 of each Federal milk order. Payments due any handler shall be off-set by any payments due from that handler.

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

Subpart–Order Regulating Handling

GENERAL PROVISIONS

§ 1030.1 General provisions.

The terms, definitions, and provisions in part 1000 of this chapter apply to this part 1030. In this part 1030, all references to sections in part 1000 refer to part 1000 of this chapter.

DEFINITIONS

§ 1030.2 Upper Midwest marketing area.

The marketing area means all territory within the bounds of the following states and political subdivisions, including all piers, docks, and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State, or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions:

. . . .

WISCONSIN COUNTIES

All counties except Crawford and Grant.

§ 1030.9 Handler.

See § 1000.9.

CLASSIFICATION OF MILK

§ 1030.40 Classes of utilization.

See § 1000.40.

PAYMENTS FOR MILK

§ 1030.70 Producer-settlement fund.

See § 1000.70.

§ 1030.71 Payments to the producer-settlement fund.

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the market administrator no later than the 15th day after the end of the month (except as provided in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

(a) The total value of milk to the handler for the month as determined pursuant to § 1030.60.

(b) The sum of:

(1) An amount obtained by multiplying the total hundredweight of producer milk as determined pursuant to § 1000.44(c) by the producer price differential as adjusted pursuant to § 1030.75;

(2) An amount obtained by multiplying the total pounds of protein, other solids, and butterfat contained in producer milk by the protein, other solids, and butterfat prices respectively;

(3) The total value of the somatic cell adjustment to producer milk; and

(4) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1030.60(i) by the producer price differential as adjusted pursuant to § 1030.75 for the location of the plant from which received.

§ 1030.72 Payments from the producer-settlement fund.

No later than the 16th day after the end of each month (except as provided in § 1000.90), the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1030.71(b) exceeds the amount computed pursuant to § 1030.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

7 C.F.R. §§ 1000.1, .9, .40, .70, 1030.1, .2, .9, .40, .70-.72.

CHIEF ALJ'S INITIAL DECISION AND ORDER
(AS RESTATED)

Facts

Petitioner, located in Appleton, Wisconsin, has been in existence as a family operated business since 1913. Petitioner's principal business is packaging fluid milk, which is also referred to as Class I milk. Petitioner is a "handler" as defined by Milk Marketing Order No. 30; that is, it receives milk from "producers" and processes it for sale. (Pet. ¶ 1; Tr. 99-100.) As a handler, Petitioner is regulated by Milk Marketing Order No. 30 (7 C.F.R. pt. 1030).

Congress enacted the AMAA in 1937 to establish orderly marketing conditions for agricultural commodities and, in the case of milk, "to raise producer prices and to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632, 637 (8th Cir. 1998).[2] The Secretary of Agriculture promulgates milk marketing orders under the authority of the AMAA. The AMAA "authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use. Adjustments are then made among the handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought." *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U.S. 76, 79-80 (1962). Milk used for fluid consumption (Class I milk), the type handled by Petitioner, usually commands the highest price, while milk used for cheese (Class III milk) and butter (Class IV milk) is usually lower priced (Tr. 171-72; 7 C.F.R. § 1000.40(a), (c)-(d)). These prices are averaged or "blended" through a process called "pooling." The AMAA requires that milk marketing orders provide for either marketwide pooling or individual handler pooling.[3] Marketwide pooling, the type in which Petitioner is required to participate, has been described as follows:

> Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the

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[2] See also 7 U.S.C. §§ 601, 602.

[3] See 7 U.S.C. § 608c(5)(A), (B).

> milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001), *appeal docketed*, No. 01-6111 (2d Cir. May 31, 2001).

This example illustrates the crux of Petitioner's complaint. Like Handler A in this example, Petitioner buys milk from producers for use as fluid milk. Petitioner must then pay into the producer-settlement fund the value of this Class I milk in excess of the regulatory milk price. Other handlers who use milk to manufacture dairy products which have a lower value such as cheese are paid money from the producer-settlement fund. (7 C.F.R. §§ 1000.70, 1030.70-.72.)

Petitioner objects to this marketwide pooling because, it asserts, it has to compete with large cheese manufacturing handlers for milk from producers. Petitioner contends that these handlers have an unfair advantage because they use the money that Petitioner has paid into the producer-settlement fund to subsidize their purchase of milk. Petitioner also asserts that there have been occasions when handlers of Class III milk have actually received more for their products than Petitioner has received for its fluid milk and that, when this circumstance has occurred, the handlers of Class III milk have avoided paying money into the producer-settlement fund by "de-pooling." Petitioner further contends that because of the "subsidy" that these handlers of Class III milk receive, Petitioner has had to compete with them by paying producers a premium in order to obtain milk and that Petitioner gets no credit for this premium. Petitioner also alleges that the larger handlers receive kickbacks and, as manufacturers of dairy products, have an unfair advantage over fluid milk handlers by receiving a "make allowance" in the calculation of the Class III milk price. Petitioner makes the additional argument that the differential for Class I milk is set at an artificially high level in Milk Marketing Order No. 30 so as to further subsidize handlers of manufactured milk products. (Petitioner's Post-Hearing Brief; Petitioner's Post-Hearing Response.)

Petitioner's position is that these conditions, which it says result from marketwide pooling, constitute unfair trade practices within the meaning of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) and deny Petitioner equal protection of the law. Milk Marketing Order No. 30, therefore, by requiring marketwide pooling, is not in accordance with the purpose of the AMAA to create orderly marketing conditions. To remedy this situation,

Petitioner seeks an exemption from marketwide pooling and a reduction in the Class I price differential. (Pet. at 5-6.)

Law

A petitioner in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)), like the instant proceeding, must establish that an order is not in accordance with law in order to prevail. To establish that an order is not in accordance with law, a petitioner must overcome two obstacles: a petitioner must establish the reasonableness of its proposal *and* it must establish clearly that the record upon which the Secretary of Agriculture based his or her decision cannot sustain the conclusion reached by the Secretary of Agriculture. The petitioner cannot challenge the Secretary of Agriculture's decision on the basis of new evidence offered at the section 8c(15)(A) hearing. *In re Daniel Strebin,* 56 Agric. Dec. 1095, 1133 (1997). Indeed, a petitioner cannot, in the section 8c(15)(A) proceeding, challenge the policy, desirability, or effectiveness of the order or even "introduce evidence relating to the wisdom of the program, or purporting to show that petitioners have been damaged or disadvantaged by activities undertaken in accordance with the provisions of the order."[4] *In re Belridge Packing Corp.,* 48 Agric. Dec. 16, 46 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulation (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991).

Discussion

This section 8c(15)(A) proceeding is the second such proceeding instituted by Petitioner. In the previous case, *In re Lamers Dairy, Inc.,* 36 Agric. Dec. 265 (1977), Petitioner objected to marketwide pooling and asserted that Class I milk was priced too high. Petitioner's assertion in that case that marketwide pooling constituted a taking without just compensation was rejected. The Secretary of Agriculture's findings relating to pooling and pricing of milk were found to be supported by substantial evidence.

Petitioner argues in the instant proceeding that it is injured by marketwide pooling, Petitioner's competitors are inequitably benefitted by marketwide pooling, and marketwide pooling constitutes an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) which prohibits "unfair methods of competition and unfair trade practices." Assuming that Petitioner is harmed by Milk Marketing Order No. 30 as it alleges, that purported harm is not grounds for exempting Petitioner from marketwide

[4]Notwithstanding this admonition, the Chief ALJ allowed Petitioner to present evidence at the hearing on how it has been affected by Milk Marketing Order No. 30.

pooling. It must be presumed that Congress did not intend to enact a statute with cross-purposes. Therefore, when Congress provided for marketwide pooling in the same statute in which it prohibited unfair trade practices,[5] I presume that Congress did not intend that marketwide pooling was to be considered an unfair trade practice. Moreover, Congress enacted the AMAA for the economic protection of producers and consumers and not necessarily for handlers.[6] Courts have noted that marketing orders do not have to be completely equitable and that an order may cause some "resultant" damage to a handler without destroying the validity of the marketing order. *United States v. Mills,* 315 F.2d 828, 837-38 (4th Cir. 1963). In short, while Petitioner may be adversely affected by marketwide pooling, this adverse affect does not invalidate marketwide pooling as being unfair within the meaning of the AMAA to those the statute is designed to protect.

Petitioner contends that this inequity violates its constitutional right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, noting that handlers under other orders are exempt from marketwide pooling and allowed to pool as individual handlers. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[7] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends. Nevertheless, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection component. Moreover, equal protection claims are treated the same under the Fifth Amendment as under the Fourteenth Amendment.[8]

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[5]See 7 U.S.C. § 608c(5)(B)(ii), (7)(A).

[6]See 7 U.S.C. §§ 601, 602.

[7]See 5 U.S.C. §§ 101, 551(1).

[8]*See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's

Equal protection "ensures that all similarly situated persons are treated similarly under the law." *Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F. Supp.2d 355, 363 (D. Vt. 1998). However, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). A regulatory classification "is accorded a strong presumption of validity" with the burden being "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe,* 509 U.S. 312, 319-20 (1993).

Petitioner has not met this burden. Petitioner has not shown that handlers allegedly exempt from marketwide pooling are "similarly situated" or negated "every conceivable" social or economic basis for marketwide pooling. On the other hand, the Secretary of Agriculture, through the Agricultural Marketing Service, stated a rational basis for adopting marketwide pooling pursuant to the AMAA:

> All Federal milk orders today, save one, provide for the marketwide pooling of milk proceeds among all producers supplying the market. The one exception to this form of pooling is found in the Michigan Upper Peninsula market, where individual handler pooling has been used.
>
> Marketwide sharing of the classified use value of milk among all producers in a market is one of the most important features of a Federal milk marketing order. It ensures that all producers supplying handlers in a marketing area receive the same uniform price for their milk, regardless of how their milk is used. This method of pooling is widely supported by the dairy industry and has been universally adopted for the eleven consolidated orders.

64 Fed. Reg. 16,130 (Apr. 2, 1999). See also the court's discussion in *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632 (8th Cir. 1998).

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approach to Fifth Amendment equal protection claims has been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; the Court's approach to Fifth Amendment equal protection claims has always been precisely the same as the Court's approach to equal protection claims under the Fourteenth Amendment).

As the Secretary of Agriculture has set forth a rational basis for marketwide pooling, there has been no violation of Petitioner's right to equal protection of the laws.

Petitioner further contends that Milk Marketing Order No. 30 is invalid because it was promulgated without a hearing as required by section 8c(17) of the AMAA (7 U.S.C. § 608c(17)). Congress, however, waived this hearing requirement in the Federal Agriculture Improvement and Reform Act of 1996 which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.[9] The Secretary of Agriculture's notice-and-comment rulemaking proceeding, which reformed federal milk marketing orders, is thus valid even though promulgated without a hearing.

Petitioner's contention that the Class I price differential is artificially high and should be reduced is likewise without merit because it too was adopted pursuant to congressional directive. 7 U.S.C. § 7253 note (Supp. V 1999). Milk pricing differentials are presumed lawful to achieve a statute's goals. *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d at 642.

Finally, while conceding that marketwide pooling has been upheld by the courts starting with the United States Supreme Court's decision in *United States v. Rock Royal Co-Op,* 307 U.S. 533 (1939), Petitioner argues that the Court decided that case in the context of the depression and that times have changed since then:

> . . . the unfair trade practices now occurring under both the old and new Order 30 could not possibly have been perceived or foreseen by the Court in 1939. The Rock Royal case is not applicable to circumstances of the years 1999 and 2000 etc.

Petitioner's Post-Hearing Brief at 10.

The issue of whether *Rock Royal* is still applicable because of changed circumstances is not within the purview of a section 8c(15)(A) proceeding. "[A]ny new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative [i.e., rulemaking], and not in his judicial capacity [i.e., in a section 8c(15)(A) proceeding]." *In re Belridge Packing Corp.*, 48 Agric. Dec. at 38. The reason for this requirement is that the Secretary of Agriculture's milk marketing order, which is presumed lawful, must be judged on the evidence contained in the rulemaking record on which the Secretary of Agriculture based the milk marketing order. "If that evidence is faulty, or if circumstances have changed so that the Order no longer produces

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[9]See 7 U.S.C. § 7253(b)(1); 63 Fed. Reg. 4803 (Jan. 30, 1998).

equitable results, the remedy is through the amendatory or termination process–not through a § 8c(15)(A) proceeding." *In re Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511, 1522 (1982), *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983).

Petitioner has failed to show that the Secretary of Agriculture could not have decided that marketwide pooling is appropriate based on the facts the Secretary of Agriculture considered when adopting Milk Marketing Order No. 30. Accordingly, I find that Milk Marketing Order No. 30 is in accordance with law. The Petition should therefore be dismissed.

Findings of Fact

1. Petitioner, Lamers Dairy, Inc., is a milk handler located in Appleton, Wisconsin.
2. Petitioner is a handler subject to the provisions of Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) and handles Class I milk.
3. Petitioner is required by Milk Marketing Order No. 30 to pool its milk under marketwide pooling.
4. The rulemaking record on which the Secretary of Agriculture promulgated Milk Marketing Order No. 30 supports the Secretary of Agriculture's conclusion that marketwide pooling is appropriate.
5. Petitioner has failed to show that the Class I price differential in Milk Marketing Order No. 30 is unlawful.
6. Petitioner has failed to show that the requirement that Petitioner pay into the producer-settlement fund, established and maintained pursuant to Milk Marketing Order No. 30, is unlawful.

Conclusions of Law

1. The Secretary of Agriculture's determination that marketwide pooling is appropriate under Milk Marketing Order No. 30 (7 C.F.R. pt. 1030) is in accordance with law.
2. The Class I price differential in Milk Marketing Order No. 30 is in accordance with law.
3. The requirement that Petitioner pay into the producer-settlement fund, established and maintained pursuant to Milk Marketing Order No. 30, is in accordance with law.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises 12 issues in Petitioner's Appeal Petition. First, Petitioner contends the Chief ALJ erroneously states that producers are paid from the

producer-settlement fund (Petitioner's Appeal Pet. at 1).

The Chief ALJ states that producers are paid from the producer-settlement fund (Initial Decision and Order at 2). I agree with Petitioner that the Chief ALJ erred. Milk Marketing Order No. 30 provides that the market administrator makes payments from the producer-settlement fund to handlers (7 C.F.R. § 1030.72). Therefore, I do not adopt the Chief ALJ's statement that producers are paid from the producer-settlement fund. However, the Chief ALJ's error is insignificant and not even approaching reversible error.

Second, Petitioner contends the Chief ALJ erroneously failed to state that "it is large Class I plant competitors who are able to extort 'kickbacks' from manufacturing plants for qualifying the manufacturing plant for obtaining money from the pool while the Petitioner is not physically able to do this." (Petitioner's Appeal Pet. at 2.)

The Chief ALJ did not find that large Class I plant competitors extort kickbacks or that Petitioner is physically unable to extort kickbacks. However, I conclude the Chief ALJ's failure to make these findings is not error. Petitioner's and other handlers' ability or lack of ability to extort kickbacks is not relevant to the sole issue in this proceeding, namely, whether any provision in Milk Marketing Order No. 30 or any obligation imposed in connection with Milk Marketing Order No. 30 is not in accordance with law.

Third, Petitioner contends the Chief ALJ erroneously stated that Petitioner invoked the Fifth Amendment to the Constitution of the United States. Instead, Petitioner contends it invoked the Fourteenth Amendment to the Constitution of the United States. (Petitioner's Appeal Pet. at 2.)

Petitioner raised the issue of a violation of its right to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, as follows:

> To deny Lamers Dairy and their [sic] farmer patrons exemption would violates [sic] the 14th Amendment of the Constitution in so far as not providing equal protection or application under the law.

Petitioner's Post-Hearing Brief at 10.

The Chief ALJ erroneously states "Petitioner contends that . . . inequity violates its constitutional right to the equal protection of the laws under the Fifth Amendment" (Initial Decision and Order at 6). Therefore, I do not adopt the Chief ALJ's statement that "Petitioner contends that . . . inequity violates its constitutional right to the equal protection of the laws under the Fifth Amendment." However, the Chief ALJ's error is insignificant. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal

government. The United States Department of Agriculture is an executive department of the government of the United States;[10] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends.

However, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection component. Moreover, as the Chief ALJ correctly noted, equal protection claims are treated the same under the Fifth Amendment as under the Fourteenth Amendment (Initial Decision and Order at 6 n.2).[11] Therefore, while the Chief ALJ erroneously stated that Petitioner cited the Fifth Amendment to the Constitution of the United States as the basis for its equal protection challenge, I find that the Chief ALJ correctly addressed the issue of whether the Secretary of Agriculture had violated Petitioner's right to equal protection under the Constitution of the United States.

Fourth, Petitioner contends that pursuant to section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)), the Secretary of Agriculture is charged with the responsibility of prohibiting unfair trade practices. Petitioner contends that marketwide pooling required by Milk Marketing Order No. 30 is an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)). (Petitioner's Appeal Pet. 2-3.)

I agree with the Chief ALJ's conclusion that marketwide pooling is not an unfair trade practice and his reasons for that conclusion. See Initial Decision and Order at 5-6. Section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) prohibits unfair trade practices in milk marketing orders and section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)) provides that milk marketing orders may provide for marketwide pooling. I find it highly unlikely that Congress would, in the same statute, prohibit unfair trade practices in milk marketing orders and specifically provide that milk marketing orders may contain a provision which is an unfair trade practice. It is well settled that, whenever possible, a statute's provisions should be read to be consistent with one another rather than contrary to one another.[12] If section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A))

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[10]See note 7.

[11]See note 8.

[12]*See Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Peck v. Jenness*, 48 U.S. (7 How.) 612, 622 (1849); *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 43 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Skidgel v. Maine Dep't of Human Services*, 994 F.2d 930, 940 (1st Cir. 1993); *McGarry v. Secretary of the Treasury*, 853 F.2d 981, 986 (D.C. Cir. 1988); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979); *Burrow v. Finch*, 431 F.2d 486, 492 (8th Cir. 1970); *Montgomery Charter*

were interpreted as prohibiting marketwide pooling, section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)) would be in conflict with section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)), which specifically provides that milk marketing orders may provide for marketwide pooling. Therefore, I reject Petitioner's contention that marketwide pooling authorized by section 8c(5)(B)(ii) of the AMAA (7 U.S.C. § 608c(5)(B)(ii)) and required by Milk Marketing Order No. 30 is an unfair trade practice in violation of section 8c(7)(A) of the AMAA (7 U.S.C. § 608c(7)(A)).

Fifth, Petitioner states "[i]f the Petitioner is not allowed to enter evidence in a (15)(A) proceeding, he [sic] is then being denied due process of law" (Petitioner's Appeal Pet. at 4).

Petitioner fails to identify the evidence that it sought to introduce which the Chief ALJ excluded. Petitioner offered 10 exhibits (PX 1-PX 10). The Chief ALJ admitted eight of Petitioner's exhibits (Tr. 62-64, 77-79, 90-92, 104-05, 113, 115-16, 142-44) and rejected only PX 4 and PX 7 (Tr. 111, 118). The Chief ALJ suggested that Petitioner attach PX 4 to or include PX 4 in Petitioner's Post-Hearing Brief (Tr. 111-12). The record does not indicate that Petitioner objected to the rejection of PX 4. Further, while the record is not clear on this point, it appears that Petitioner followed the Chief ALJ's suggestion and included the substance of PX 4 in Petitioner's Post-Hearing Brief. See Petitioner's Post-Hearing Brief at 3-4.

Petitioner's Exhibit 7 is Richard J. Lamers' affidavit. During Richard J. Lamers' testimony, Mr. Lamers offered his own affidavit in evidence. Responding to an objection by Complainant, the Chief ALJ stated that since Mr. Lamers was at the hearing to testify, his testimony would be better than an affidavit. The Chief ALJ then allowed Richard J. Lamers to read his affidavit into the record or to summarize his affidavit in testimony. Mr. Lamers took advantage of this opportunity. (Tr. 118.) The record does not indicate that Petitioner objected to the rejection of PX 7.

Moreover, the Chief ALJ overruled 22 of Complainant's objections to Petitioner's questions (Tr. 10-11, 18-20, 34-37, 39, 49, 50-52, 56, 72-73, 88-89, 131, 133-35, 137, 181). The Chief ALJ sustained only Complainant's objection on the grounds of relevance to a question posed by Petitioner during its cross-examination of Robert A. Bohse (Tr. 184). The record establishes that Petitioner did not object to the limitation on the scope of its cross-examination of Mr. Bohse (Tr. 184).

Service, Inc. v. Washington Metropolitan Area Transit Comm'n, 325 F.2d 230, 234 (D.C. Cir. 1963); *Brotherhood of Locomotive Firemen & Enginemen v. Northern Pacific Ry.*, 274 F.2d 641, 646 (8th Cir. 1960); *Korte v. United States*, 260 F.2d 633, 636 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959); *HIGA v. Transocean Airlines*, 230 F.2d 780, 784 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956); *Fisher v. District of Columbia*, 164 F.2d 707, 708-09 (D.C. Cir. 1947).

I agree with the Chief ALJ's rejection of PX 4 and PX 7 and the Chief ALJ's limitation of the scope of Petitioner's cross-examination of Mr. Bohse. Moreover, as Petitioner did not object to the rejection of PX 4 or PX 7 or to the limitation of the scope of its cross-examination of Mr. Bohse, the Chief ALJ's rejection of PX 4 and PX 7 and limitation of the scope of Petitioner's cross-examination of Mr. Bohse cannot be appealed by Petitioner.[13] Therefore, I reject Petitioner's contention that it was not allowed to introduce evidence and was thereby denied due process in this proceeding.

Petitioner further contends the Chief ALJ did not consider Petitioner's evidence (Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 7).

Administrative law judges must adequately review the record in a proceeding prior to the issuance of a decision in that proceeding. Petitioner does not cite a basis for its contention that the Chief ALJ did not consider Petitioner's evidence, and I find nothing in the record which supports Petitioner's contention. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[14] Moreover,

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[13]See 7 C.F.R. § 900.60(d)(2).

[14]*See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-

the Chief ALJ's Initial Decision and Order in which he thoroughly discusses the evidence Petitioner adduced belies Petitioner's contention that the Chief ALJ did not consider Petitioner's evidence. Therefore, I reject Petitioner's unsupported contention that the Chief ALJ did not consider Petitioner's evidence.

Petitioner attached two documents to Petitioner's Appeal Petition. Respondent objects to the Judicial Officer's consideration of these two documents because they were not introduced at the hearing (Respondent's Response to Petitioner's Appeal Pet. at 5). Petitioner admits that these two

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82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating that, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

documents were not introduced at the hearing but argues that, as the documents are only extensions and explanations of PX 1 and Mark J. Lamers' and Richard J. Lamers' testimony, the documents "should and must be considered" (Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 7-8).

Section 900.68(a)(1) and (2) of the Rules of Practice provides that an application to reopen the hearing to take further evidence must be filed with the Hearing Clerk, as follows:

> **§ 900.68 Applications for reopening hearings; for rehearings or reargument of proceedings; or for reconsideration of orders.**
>
> (a) *Petition requisite*–(1) *Filing; service.* An application for reopening the hearing to take further evidence . . . shall be made by petition addressed to the Secretary and filed with the hearing clerk, who immediately shall notify and serve a copy thereof upon the other party to the proceeding. Every such petition shall state the grounds relied upon.
>
> (2) *Petitions to reopen hearings.* A petition to reopen the hearing for the purpose of taking additional evidence may be filed at any time prior to the issuance of the final order. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 900.68(a)(1)-(2).

Petitioner did not file a petition to reopen the hearing to take further evidence. Therefore, I conclude that the two documents attached to Petitioner's Appeal Petition, which were not introduced at the hearing, are not part of the record. I have not considered the two documents which Petitioner attached to Petitioner's Appeal Petition.

Sixth, Petitioner contends the Chief ALJ erroneously failed to address the purpose of the Class I differential (Petitioner's Appeal Pet. at 4-5).

The Chief ALJ stated "Petitioner's contention that the Class I price differential is artificially high and should be reduced is . . . without merit because it . . . was adopted pursuant to Congressional directive. 145 Cong. Rec. No. 163, Part II (November 17, 1999). Milk pricing differentials are presumed lawful to achieve a statute's goals. *Minnesota Milk Producers Ass'n v. Glickman*, [153 F.3d] at 642." (Initial Decision and Order at 7 (footnote omitted).)

The Class I price differential in Milk Marketing Order No. 30 was adopted pursuant to 7 U.S.C. § 7253 note (Supp. V 1999). Petitioner's challenge to the Class I price differential is a challenge to a congressional directive. In the absence of any claim that the setting of the Class I price differential by Congress

is unconstitutional, the Class I price differential must be upheld. Petitioner presents no argument that would provide a basis for concluding the Class I price differential set by Congress is unconstitutional. Further, the purpose of the Class I price differential, which Petitioner contends the Chief ALJ erroneously failed to address, is not relevant to the only issue in this proceeding, namely, whether any provision in Milk Marketing Order No. 30 or any obligation imposed in connection with Milk Marketing Order No. 30 is not in accordance with law. Thus, I reject Petitioner's contention that the Chief ALJ's failure to address the purpose of the Class I differential is error.

Seventh, Petitioner contends the following sentence quoted by the Chief ALJ from *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50 (2000), is error: "The pool achieves equality among producers, and uniformity in price paid by handlers." Petitioner states that it has to pay more than some other handlers to obtain milk. (Petitioner's Appeal Pet. at 5-7.)

The record does establish that Petitioner paid in excess of the uniform minimum price set by Milk Marketing Order No. 30 in order to induce producers to sell milk to Petitioner. However, the premium paid by Petitioner is not regulated by the AMAA or Milk Marketing Order No. 30. The uniformity in price paid by handlers referenced in *Stew Leonard's v. Glickman*, which the Chief ALJ correctly quoted, relates only to the price regulated under the AMAA. I find no basis upon which to modify the Chief ALJ's correct quotation of *Stew Leonard's v. Glickman*.

Eighth, Petitioner contends the Chief ALJ erroneously failed to address the effect on Petitioner of having to pay premiums in order to obtain milk and the effect on Petitioner of having to make payments to the producer-settlement fund (Petitioner's Appeal Pet. at 8-9).

As an initial matter, Petitioner is not required by either the AMAA or Milk Marketing Order No. 30 to pay premiums to obtain milk. Moreover, much of the Chief ALJ's Initial Decision and Order is devoted to addressing the effect of Milk Marketing Order No. 30 on Petitioner. Therefore, I reject Petitioner's contention that the Chief ALJ failed to address the effect of Petitioner's having to pay into the Milk Marketing Order No. 30 producer-settlement fund.

Ninth, Petitioner contends the Secretary of Agriculture cannot make impartial decisions regarding orders and unfair trade practices because, pursuant to section 8c(9)(B) of the AMAA (7 U.S.C. § 608c(9)(B)), producers can, by vote, terminate an order (Petitioner's Appeal Pet. at 9-10).

The record contains no evidence which supports Petitioner's contention that the Secretary of Agriculture cannot make impartial decisions regarding marketing orders and unfair trade practices. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their

official duties.[15] Therefore, I must presume that the Secretary of Agriculture can and does make impartial decisions regarding marketing orders and unfair trade practices. I reject Petitioner's unsupported contention that the Secretary of Agriculture cannot make impartial decisions regarding marketing orders and unfair trade practices because orders must be approved or favored by producers as provided in section 8c(9)(B) of the AMAA (7 U.S.C. § 608c(9)(B)).

Tenth, Petitioner contends *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963), is inapposite because it does not concern the prohibition of unfair trade practices (Petitioner's Appeal Pet. at 10-11).

I agree with Petitioner that *United States v. Mills* does not concern the prohibition of unfair trade practices. However, I disagree with Petitioner's contention that *United States v. Mills* is inapposite. Petitioner contends it is adversely affected by marketwide pooling and marketwide pooling gives cheese manufacturers an unfair advantage over Petitioner. The Chief ALJ cited *United States v. Mills* as authority for his statement that "[c]ourts have noted that marketing orders do not have to be completely equitable and that an order may cause some 'resultant' damage to a handler without destroying the validity of the order." (Initial Decision and Order at 5.) I conclude *United States v. Mills* is pertinent to the purported adverse effect of Milk Marketing Order No. 30 on Petitioner, which Petitioner raised in this proceeding.

Eleventh, Petitioner states that Congress' authorization to promulgate federal milk marketing orders without a hearing defies basic democratic principles (Petitioner's Appeal Pet. at 12).

The promulgation of a milk marketing order under the AMAA is a rulemaking proceeding. Rulemaking is legislative in nature. Once an agency action is characterized as legislative, constitutional procedural due process requirements do not apply.[16] Further, the hearing requirement in section 8c(17) of the AMAA (7 U.S.C. § 608c(17)) is not a constitutional requirement, and Congress may amend this statutory hearing requirement or exempt the Secretary

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[15] See note 14.

[16] *See United States v. Florida East Coast Ry.*, 410 U.S. 224, 245 (1973) (stating there is no across-the-board constitutional right to oral hearings in administrative proceedings for the purpose of promulgating policy-type rules or standards); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994) (stating official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause); *Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) (stating once agency action is characterized as legislative, procedural due process requirements do not apply); *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980) (stating where an agency action is not based on individual grounds, but is a matter of general policy, no hearing is constitutionally required); *Pickus v. United States Board of Parole*, 543 F.2d 240, 244 (D.C. Cir. 1976) (stating when not bounded by statutory procedural requirements, the Supreme Court has been consistently willing to assume that due process does not require any hearing or participation in "legislative" decisionmaking).

of Agriculture from the hearing requirement at any time. Congress waived the hearing requirement in section 8c(17) of the AMAA (7 U.S.C. § 608c(17)) in the Federal Agriculture Improvement and Reform Act of 1996 which provides that the Secretary of Agriculture shall use the notice and comment procedures provided in 5 U.S.C. § 553 to reform federal milk marketing orders.[17] The Secretary of Agriculture's notice-and-comment rulemaking proceeding, which reformed federal milk marketing orders, is thus valid even though the rulemaking proceeding was not conducted in accordance with the procedures in section 8c(17) of the AMAA (7 U.S.C. § 608c(17)).

Twelfth, Petitioner contends that it has a minimal effect on Milk Marketing Order No. 30 and failure to exempt Petitioner while exempting other small handlers violates the Fourteenth Amendment to the Constitution of the United States (Petitioner's Appeal Pet. at 13; Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 10).

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[18] it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as Petitioner contends.

Nevertheless, the Fifth Amendment to the Constitution of the United States, which is applicable to the federal government, contains an equal protection component. Moreover, equal protection claims are treated the same under the Fifth Amendment as under the Fourteenth Amendment.[19] Equal protection requires that persons similarly situated be treated alike; however, it should be noted that virtually all statutes and regulations classify for one purpose or another, but equal protection does not prohibit legislative classifications.[20]

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[17]See note 9.

[18]See note 7.

[19]See note 8.

[20]*See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things

Petitioner fails to identify any handler located within the territory to which Milk Marketing Order No. 30 is applicable[21] who is situated similarly to Petitioner and is exempt from the requirements of Milk Marketing Order No. 30. Instead, Petitioner indicates that some handlers located in Missouri, a state that is not within the territory to which Milk Marketing Order No. 30 is applicable, are exempt from regulation under any federal milk marketing order (Petitioner's Appeal Pet. at 13; Petitioner's Response to Respondent's Response to Petitioner's Appeal Pet. at 10). Therefore, I reject Petitioner's contention that the failure to exempt Petitioner from the requirements of Milk Marketing Order No. 30 is a violation of Petitioner's right to equal protection of the laws.

For the foregoing reasons, the following Order should be issued.

ORDER

I.

Petitioner's Petition is dismissed.

II.

Petitioner has the right to obtain review of this Order in any district court of the United States in which Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed

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which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

[21] See 7 C.F.R. § 1030.2.

within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is August 16, 2001.

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